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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, and SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*,

v.

THE BALTIMORE & OHIO RAILROAD, *et al.*, *Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## BRIEF FOR RESPONDENTS IN OPPOSITION

### PRELIMINARY STATEMENT

The petitioners' statement of "Questions Presented" and the "Statement" which follows in the petition do not fairly indicate the nature of the issues raised by the amended complaint, or the nature of or bases for the decisions of the District Court and the Court of Appeals.[1]

[1] Merely as illustrative, compare the statement in the petition that the original complaint "was held by the district court to [illegible] a good cause of action" (p. 4) with paragraphs 3 to 6 of the final order of that court (pp. 19a, 20a).

As will appear *infra* (pp. 14 to 21), the decisions of the lower courts do not present any question of due process of law. There is consequently no basis for the first question suggested in the petition. The question numbered 4 in the petition (now supplemented for the first time by question numbered 3) is not properly involved in these proceedings. It was not pleaded, argued, mentioned, or referred to by the petitioners in the District Court. The Court of Appeals held that "This contention comes too late now." (Opinion, p. 14; Petition, p. 17a.) The other questions which appear in the petition are stated in generalities and in utter disregard of the issues which petitioners raised in their amended complaint (P.A. 53-55) as well as the basis upon which the lower courts proceeded.

The questions presented, the facts involved, and the proceedings had in the courts below are correctly stated *infra* (pp. 2 to 11). The spurious questions presented in the petition are considered in the succeeding argument.

## QUESTIONS PRESENTED

1. Does the Railway Labor Act prohibit a carrier, which has complied with all of the procedural provisions of the Act, from changing or altering existing agreements between such carrier and its employees concerning rates of pay, rules, and working conditions by eliminating from such agreements a rule or rules requiring the carrier to employ a fireman (helper) on diesel and electric locomotives used in freight and yard service[2], and promulgating a rule that management has the right to determine when and if a fireman (helper) shall be used on such locomotives?

[2] Under most existing agreements carriers are not required to use a fireman on diesel locomotives weighing 90,000 pounds or less on their driving wheels, when used in yard service, if such power was installed on or prior to June 1, 1950.

2. Does the Railway Labor Act prohibit a carrier, which has complied with all of the procedural provisions of the Act, from changing or altering existing agreements between such carrier and its employees concerning rates of pay, rules and working conditions by eliminating from such agreements a rule or rules specifying the number and classification of trainmen which shall be used in road train crews and the number of brakemen (helpers) which shall be used in yard ground crews, and promulgating a rule providing that management has the right to determine when and if trainmen shall be used in road crews and brakemen (helpers) in yard crews, and if used, the number and classification of such employees?

## STATEMENT OF THE CASE

The labor dispute which has culminated in these proceedings involves efforts of the respondents[3] both to revise and to eliminate certain rules contained in existing agreements between the carriers and their operating employees which, during the year 1961, cost the railroad industry more than 592 million dollars in wage costs of unneeded employees occupying redundant positions; pay for time not worked, compensation that was not commensurate with the value of the services rendered, and the cost of owning and maintaining equipment and facilities that would not be required apart from the restrictions placed upon the efficiency and economy of operations by such rules. (D.A. 180, 192) For more than 20 years efforts have been made by the carriers to negotiate changes in existing agreements relating to this

[3] Respondents will be referred to herein as "carriers" and petitioners as "organizations." References to "D.A." are to Appendix of Defendants-Appellees; "P.A." refers to Appendix of Plaintiffs-Appellants.

subject matter, but such efforts have produced no substantial or meaningful relief. (D.A. 161-2)

The current movement to revise existing agreements was initiated by the carriers on February 10, 1959, when the chief executive officers of the organizations were urged to join with representatives of the carriers in requesting the President to appoint a commission to study the impact of existing agreements between the parties on the public welfare, the solvency of the industry and the security of railroad workers. (D.A. 2, 159, 160) The organizations rejected the carriers' proposal and opposed the carriers' request that the President establish such a commission. In a letter directed to the President, the organizations urged that the issues involved should be handled and determined under the procedures provided by the Railway Labor Act. (D.A. 5-19, 160-165)

On September 9, 1959, the President advised the carriers that he could not consider their proposal because the appointment of a commission at that time could interfere with normal collective bargaining processes. (D.A. 20, 163, 164)

On November 2, 1959, the carriers served on the representatives of the organizations, pursuant to the provisions of Section 6 of the Railway Labor Act, notices of intended changes in agreements affecting rates of pay, rules and working conditions. (P.A. 57-78, 96-108; D.A. 21-40, 137, 165, 166) These proposed changes in existing agreements contemplated the following:

1. The elimination of existing rules and agreements requiring the use of firemen on other than steam locomotives when used in yard and freight service.

2. The revision of rules governing the basis of pay and the assignments of railroad operating employees

used in through freight and straightaway passenger service.

3. The elimination of rules requiring the use of a stipulated number of trainmen in road train crews and a stipulated number of brakemen (helpers) in yard ground crews.

4. The elimination of rules requiring the use of operating employees on motor cars and self propelled work machines used in inspection, construction, repair and maintenance work, and

5. Various miscellaneous and minor other changes which are not material in these proceedings.

The purpose and intent of the carriers' proposals relating to the consist of train and engine crews, as stated in said proposals, is to give railway managements the right to determine when and if firemen will be used on other than steam power in freight and yard service, and the number of trainmen and brakemen that shall be used in road and yard crews, as each carrier may find to be appropriate for the safe, efficient and economical operation of its service.

These proposals were the subject of conferences on individual railroads, but no agreements were reached. (D.A. 42, 166) On June 9, 1960, the carriers requested concerted national handling of their proposals by national bargaining committees designated by the carriers and the organizations. Meetings of such national bargaining committees were begun on July 6, 1960, and extended through October 17, 1960. During such national conferences the organizations contended (contrary to the position they had previously taken) that the ordinary processes of the Railway Labor Act were not suited to handling the carriers' proposals, and now urged that the parties agree to refer the carriers' proposals and such other proposals as either party might desire

to submit to "a special wage study commission." (D.A. 42-76, 137, 166-171)

On October 17, 1960, a Memorandum of Agreement was entered into between the carriers and the organizations, under the auspices of the Secretary of Labor, providing for the creation of a Presidential Railroad Commission to investigate the facts and report its findings and recommendations to the President with respect to the controversy between the parties—substantially as proposed by the organizations. (P.A. 57, 83-109, 145; D.A. 71-76, 171) It was further provided in said Memorandum of Agreement that the "controversy between the parties" involved the proposals of the carriers contained in their Section 6 notices of November 2, 1959, and proposals of the organizations served on the carriers on September 7, 1960 (both of which were attached to the memorandum) "including any implementing proposal or proposals that may be submitted to the Commission." (P.A. 83, 84, 96-109)

The organizations thereafter expressed their entire satisfaction with the arrangements stipulated in the Memorandum of Agreement, and reasserted their contention "that the work rules problem is too difficult to be resolved under the regular procedures of the Railway Labor Act" (D.A. 79, 80, 171, 172); and on November 1, 1960, the Presidential Commission requested by the parties was duly created by Executive Order No. 10891. (P.A. 110, 111)

The members of the Commission were appointed by the President on December 22, 1960. Five of the members of the Commission were appointed from nominations submitted by the organizations, five members from nominations submitted by the carriers, and five public members were ap-

pointed without nominations from the parties. (D.A. 83, 84)[4]

The Commission began its hearings on February 6, 1961, and delivered its report and recommendations to the President on February 28, 1962. There were 15,500 pages of testimony and 25,000 pages of exhibits submitted by the parties and received by the Commission. The Commission also made numerous studies independently of the parties, and was assisted in its work by a staff of independent technical experts. (D.A. 172) Beginning in October, following the fact-gathering stage of the Commission's proceedings, the public members of the Commission sought to narrow the issues and mediate the differences between the parties, but no agreement was reached. (P.A. 57, 145; D.A. 172-177)

When the report and recommendations of the Commission were delivered to the President on February 28, 1962, the President requested the parties to enter into immediate and expeditious collective bargaining over the issues which remained in dispute. (D.A. 127, 128, 138, 139) National conferences were resumed on April 2, 1962, and continued through May 17, 1962. The carriers accepted the report and recommendations of the Presidential Commission but its report and recommendations were rejected by the organizations, and no agreement was reached. (P.A. 12, 13, 57, 58, 145; D.A. 129-134, 140, 177, 178)

On May 22, 1962, the organizations made application for the mediation services of the National Mediation Board under Section 5 of the Railway Labor Act (45 U.S.C. 155), and during the period May 25 to June 22, 1962, approximately 32 meetings were held with the representatives of

[4] On March 5, 1961, President Kennedy appointed Judge Simon H. Rifkind as Chairman of the Commission to assume the post previously held by former Secretary of Labor Mitchell. (D.A. 85-88)

the carriers and the organizations under the auspices of the Chairman of that Board. But the National Mediation Board was unable to bring the parties into agreement. (P.A. 58, 145; D.A. 135, 178, 179)

On June 26, 1962, the National Mediation Board requested and urged that the carriers and the organizations enter into an agreement to submit the controversy to arbitration under Section 7 of the Railway Labor Act (45 U.S.C. 157). The carriers accepted this proffer of arbitration but the organizations rejected it. (P.A. 120-122, 145; D.A. 179, 180)

On July 16, 1962, the National Mediation Board advised the parties that in its judgment all practical methods provided for its adjusting the dispute had been exhausted without effecting a settlement, and that the Board had that day terminated its services under the provisions of the Railway Labor Act. (P.A. 58, 121, 145, 146)

On July 17, 1962, the carriers served notice on the organizations that effective August 16, 1962, the carriers would place in effect the changes in rates of pay, rules and working conditions which had been recommended by the Presidential Railroad Commission.[5] On July 26, 1962, the organizations filed their complaint in the District Court in which they alleged that the carriers' promulgation of rules to make effective the recommendations of the Commission violated the Railway Labor Act: first, because the promulgation embodied provisions which had not been presented to the organizations in the form of a notice pursuant to Section 6 of the Railway Labor Act; second, because cer-

[5] The changes proposed by the carriers to make effective the Commission's recommendations are set forth in their first promulgation of revisions in work rules, which is attached as Appendix A to the complaint filed in the District Court. (P.A. 10-49, 58; D.A. 141, 143, 144)

tain provisions of the promulgation would require the organizations to submit to compulsory arbitration in alleged violation of Section 7 of the Act, and third, because other provisions of the promulgation would impose supposed illegal restrictions on the rights of the employees represented by the organizations to bargain collectively through representatives of their own choosing. (P.A. 5-7)

On August 6, 1962, with leave of court and without objection from the organizations, the carriers withdrew their first promulgation of rules changes, dated July 17, 1962, and served upon the organizations a second promulgation of rules changes, dated August 6, 1962, in which the organizations were given notice that effective August 16, 1962, the carriers would place in effect the rules changes proposed in their notices served under Section 6 of the Railway Labor Act on November 2, 1959. (P.A. 57-78, 117, 124, 125; D.A. 142-148) The District Court and the representatives of the organizations were informed that, although the carriers were willing to settle the dispute on the basis of the Commission's recommendations, the rules proposed for making those recommendations effective were withdrawn and the rules changes proposed by the carriers in their Section 6 notices dated November 2, 1959, were substituted in lieu thereof (in the carriers' second promulgation) in order to avoid litigation or any other development that might delay revision of the provisions of existing agreements that were costing the carriers $1,609,000 each day in unnecessary and unjustifiable operating expense. (P.A. 59; D.A. 142-148, 180, 192)

On August 7, 1962, the District Court overruled a motion of the carriers to dismiss the complaint on grounds that the suit had been prematurely brought before the dispute

involved had been submitted to and considered by an emergency board under Section 10 of the Railway Labor Act and because the organizations had not exhausted their administrative remedies provided in that Act.[6] (P.A. 116, 117) The District Court found that both parties had exhausted all of the procedures available to them under the Railway Labor Act. (P.A. 12, 13, 124, 127, 128, 145, 146) On the same day the District Court dismissed the complaint, finding that the issues tendered in the complaint had become moot. (P.A. 117)

The organizations then filed an amended complaint, alleging that

> "Said second Promulgation is in violation of Section 2, First, of the Railway Labor Act in that it announces that effective August 16, 1962 there will be no rules concerning the assignment of employees of the carriers represented by plaintiffs, the minimum number of such assignments to a train or engine, and the classification of such assignments, except in road passenger service, notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements between the plaintiffs and the carriers represented by the defendants to contain such rules and notwithstanding the explicit duty imposed

[6] In the course of the hearings on this motion, the District Court was informed that the Secretary of Labor had assured the parties that an Emergency Board would be appointed, under Section 10 of the Railway Labor Act, if the carriers' promulgation and the organizations' asserted intention to resist by the use of economic force should "threaten substantially to interrupt interstate commerce." (Tr. 31-34, 243-46) The dispute remains in this posture, insofar as the applicability of the provisions of Section 10 is concerned. Consequently, denial of the petition will in all probability result in the appointment of an Emergency Board and the attendant procedures of investigation and mediation, during which the carriers may not make effective their proposed rules changes, except by agreement, and the organizations may not pursue their threatened strike action.

> by Section 2, First of the Railway Labor Act upon the plaintiffs and the carriers represented by the defendants to make and maintain agreements concerning such rules." (P.A. 54)

It is important to keep in mind, in considering the issues involved in these proceedings, that this supposed cause of action refers only to rules relating to "the assignment of employees . . . the minimum number of such assignments to a train and engine, and the classification of such assignments, except in road passenger service." It is thus obvious that the amended complaint deals only with the carriers' proposed rules relating to the use of firemen on diesel locomotives in freight and yard service and to the consist of crews in road train service.

After hearings before the District Court on the carriers' motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted, the District Court entered its final order, dated August 8, 1962, "that this suit and the amended complaint of the plaintiffs shall be and hereby are dismissed because plaintiffs' amended complaint fails to state a claim upon which relief can be granted." (P.A. 116-118)

The organizations appealed from this final order of the District Court (P.A. 119), and on November 28, 1962, the Court of Appeals affirmed the order of the District Court. A petition for rehearing was filed with the Court of Appeals by the organizations on December 13, 1962, and was denied on December 19, 1962.

## SUMMARY OF ARGUMENT

The organizations' claim, stated in question numbered 1, that the decision of the Court of Appeals rests on unfounded

and unproven findings of fact which were not considered by the trial court and thus involves a denial of due process, is without merit. The facts referred to by the Court of Appeals were before the District Court prior to its dismissal of the amended complaint. They were presented to the Court by statements of counsel and by exhibits, and were undisputed. Counsel for the organizations did not challenge their accuracy, and when afforded opportunities to rebut the facts or to offer further evidence, declined to do so. There is no substance, therefore, to the due process contentions which the organizations present. Furthermore, the issues raised by the amended complaint were decided by the Court of Appeals as a matter of law and on the basis of the allegations contained therein.

The principles of law which the Court of Appeals considered controlling are clearly and firmly established by prior decisions of this Court, and were correctly applied. These decisions hold that the Railway Labor Act deals solely with the procedure to be followed in disputes arising out of proposed changes in rates of pay, rules, and working conditions; that when those procedures have been exhausted, as they have been here, carriers may make unilateral changes in collective agreements governing the working conditions of their employees; that the substance of such changes is not governed or restricted by the Act; and that specifically there is no restriction in the Act on the adoption of provisions giving management a larger measure of discretion in the use or assignment of employees.

Moreover, the existence of large areas of management discretion is recognized under numerous cases and authorities as a normal condition in the relationships between carriers and their employees represented by labor organiza-

tions, and no illegality exists by reason of the creation or existence of such areas.

The organizations' question numbered 3 and the argument relating thereto, are based on the assumption that the Court of Appeals decided a question as to the bargainability of the carriers' proposals. Such an issue is not and never has been in the case. Both sides have treated the carriers' proposals as bargainable throughout and no issue as to this was raised or decided by the Court of Appeals.

Question numbered 4 concerns the holding of the Court of Appeals that the Railway Labor Act in its provisions relating to "craft or class" does not deal with the assignment of work. The organizations' argument, based on scattered references in the Railway Labor Act to the term "class or craft", was and is that these provisions were intended to preserve rights to certain specific work to employees merely because they are in a given class or craft for representation purposes. The Court of Appeals properly rejected these contentions, both because they came too late and because they lack merit. Those provisions of the Act referred to in the petition do not govern the assignment of work to individual employees or as between classes or crafts of employees. Any restrictions of this nature are purely a matter of contract, if they exist at all.

## ARGUMENT

### I. THE DECISION OF THE COURT OF APPEALS DOES NOT RAISE ANY QUESTION OF DUE PROCESS OF LAW

In their statement of the questions presented and in the argument in support of their petition, the organizations claim that they have been denied due process of law, arguing that the opinion of the Court of Appeals rests on unfounded and unproven findings of fact. It is contended that no evidence was received or considered by the District Court, and that the organizations had no opportunity to introduce evidence. It is further asserted that the evidence summarized by the Court of Appeals in its opinion was not before the District Court when it dismissed the amended complaint, but was presented subsequently in connection with the organizations' motion for an injunction pending appeal.

None of these contentions are true.

#### A. Substantially all of the facts summarized in the opinion of the Court of Appeals are undisputed, and were before the District Court when it dismissed the organizations' amended complaint.

Counsel for the carriers prefaced his opening statement in support of the carriers' motion to dismiss the organizations' complaint as follows:

> "The material facts involved cannot be the subject of dispute and will, I believe, be agreed to by counsel for the plaintiffs.
>
> "But if there is any question about any matter that is material to the motion, I am prepared to call witnesses on those matters.
>
> "In any event, with your Honor's leave, I would like to first, and at this time, explain the circumstances

which the defendants rely upon in support of this motion." (Tr. 9, 10; D.A. 137)

Counsel then stated the facts leading up to the proceedings before the District Court, without objection by the organizations, covering the following: —

1. The nature and initial service of the carriers' notices of intended changes in agreements governing the compensation, use and assignments of their employees represented by the organizations. (Tr. 10; D.A. 137) *The carriers' proposed rules changes were later offered in evidence at the suggestion of the District Judge prior to his ruling on the motion to dismiss the amended complaint, and were received in evidence without objection from the organizations as a part of Carriers' Exhibit 2 (P.A. 81-115) "for the purposes of this motion."* (Tr. 129, 130)

2. The circumstances attending the establishment of the Presidential Commission pursuant to a memorandum of agreement between the carriers and the organizations. (Tr. 11, 12; D.A. 137) *This agreement, dated October 17, 1960, and the Executive Order of the President establishing the Commission, were also a part of Carriers' Exhibit 2, which was offered in evidence at the suggestion of the District Court prior to its ruling on the motion to dismiss the amended complaint and received in evidence without objection by the organizations "for the purpose of this motion." (Tr. 129, 130; P.A. 81-115)*

3. The composition and proceedings of the Presidential Commission. (Tr. 12; D.A. 138; Tr. 13; D.A. 138; Tr. 14; D.A. 139)

4. The delivery of the report and recommendations of the Commission to the President, who requested the parties to enter into immediate and expeditious collective bargain-

ing over the issues which remained in dispute. (Tr. 15; D.A. 139). *Excerpts from the statement of the President were read into the record without objection. (Tr. 13-15; D.A. 138, 139)*

5. The proceedings subsequent to the receipt of the Commission's report, including conferences between the parties, (Tr. 15, 16; D.A. 140; see also Tr. 69; D.A. 143), mediation proceedings conducted by the National Mediation Board pursuant to the provisions of the Railway Labor Act (Tr. 15; P.A. 120), and the proffer of arbitration which was accepted by the carriers but was rejected by the organizations. (Tr. 16, 17; P.A. 120, 121; see also Tr. 22, 23; D.A. 141, 142)

6. Advice from the National Mediation Board that in its judgment all practical methods providing for its adjusting the dispute had been exhausted without effecting a settlement, and that the Board had that day terminated its services under the provisions of the Railway Labor Act. (Tr. 17; P.A. 121)

7. The carriers' proposed rules changes were progressed in conformity with all applicable provisions of the Railway Labor Act. (Tr. 22; D.A. 141)[7]

After the foregoing recitation of facts, counsel for the carriers stated

[7] Counsel for the organizations in arguing that the rules changes proposed by the carriers in their second promulgation were not detailed changes in rules, as required by the Railway Labor Act, stated that

> "Now, if they had promulgated in their original notices certain detailed changes in rules and they had been progessed through the procedures of the Railway Labor Act *to the present stage*, then I think that we would have to agree that those changes could be put into effect." (Tr. 97; P.A. 135. See also Tr. 120-124; P.A. 150-153 to the same effect.)

"You will recall that I prefaced my statement to your Honor that if there is any question as to any fact that I have stated, that I am prepared to call witnesses." (Tr. 36)

Neither the court nor counsel for the organizations questioned any part of the carriers' statement of facts, which include all the material facts recited or relied upon in the opinion of the Court of Appeals.

Thereafter, counsel for the organizations stated that

"This Commission that Mr. Neitzert talked about was established." (Tr. 43)

"Here we have had a Section 6 notice; we had this Commission and we had national bargaining and we had mediation by the Mediation Board.

"Now, all that is left for us to do is to threaten—not threaten, but announce that we are going on strike and there will be a national emergency." (Tr. 48)

Following the foregoing statements of counsel, the District Judge found that both the carriers and the organizations had exhausted the administrative remedies available to them under the Railway Labor Act and were free to resort to self-help.*

* The findings of fact and conclusions of law of the District Judge, which were read into the record and which show that he had given consideration to the evidence that had been theretofore presented, include the following:

"This Court does, however, hold that there are no further administrative relief that either of the parties are obligated to, or could, upon their own rights obtain. . . .

"At this stage, and after the National Mediation Board has withdrawn its efforts to effect a settlement, both the Carriers and the Unions are left free to rely upon self-help, and to engage in an economic war which is only restricted by the provisions of Section 10 wherein the President is authorized to appoint an Emergency Board after he has been informed by the National Mediation Board of an emergency, and neither party

During the proceedings which followed, involving the question of whether the amended complaint states a claim upon which relief can be granted, Carriers' Exhibit 2 was received in evidence (see page 15, *supra*), and counsel for the carriers again directed the District Court's attention to the facts that had been theretofore stated. (Tr. 111-114; P.A. 144-146) The District Court then twice asked counsel for the organizations whether they had anything further to submit. In each case counsel for the organizations answered that they did not think so. (Tr. 136, 137; P.A. 161, 162)[9]

The procedure followed in the District Court was in complete conformity with Rule 12(b) of the Rules of Civil Procedure of the United States District Courts; and the District Court thus had before it substantially all of the evidence summarized by the Court of Appeals in its opinion before the organizations' amended complaint was dismissed.

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is required to request the President to appoint such a Board and neither party is prohibited from doing so.

"The evidence indicates in this case that neither has made such a request, though apparently both of them have discussed the problem with the Secretary of Labor. . . .

"There remains no administrative remedy for either party; only self-help remains, the discharge of employees by Carriers that it deems unnecessary to carry on their work or the cessation of work by the employees at the time set for such discharge". (Tr. 84, 85)

[9] Counsels' statements of fact were thereafter corroborated by evidence offered in connection with the organizations' motion for an injunction pending appeal. The organizations have twice agreed that the Court of Appeals might consider this corroborating evidence "if it chooses." (Reply Brief, p. 2; arguments before the Court of Appeals on October 22, 1962; note 2, Opinion, p. 2, Petition, p. 3a. Cf., Petition, pp. 16, 17.) The fact is that substantially all of the evidence summarized by the Court of Appeals in its opinion was presented both before and after the District Court dismissed the amended complaint, as appears from the foregoing discussion of the matter in this brief.

**B. The facts which the organizations now allege to be in dispute were in fact undisputed, and all such material facts were before the District Court at the time it dismissed the amended complaint.**

The organizations do not contend that it was inappropriate for the Court of Appeals or the District Court to consider undisputed facts appearing of record in determining the sufficiency of the amended complaint. The only findings of the Court of Appeals that are complained of in the petition are there described as follows:

> "While the opinion of the Court of Appeals is not clear it seems to find that the petitioners insisted on unreasonable rules which cost the carriers $592,062,000 in wage costs during 1961 (p. 6a, *infra*) that the petitioners by agreeing to the appointment of the Presidential Railroad Commission waived the usual procedures of the Railway Labor Act in processing a certain notice of proposed change given to petitioners by the carriers on November 2, 1959 (pp. 8a, 14a, *infra*), that the respondents 'accepted' the Report of the Presidential Railroad Commission but that petitioners 'rejected' it (p. 9a, *infra*), that the petitioners engaged in 'sterile discussion' (p. 15a, *infra*), 'frustrated collective bargaining' (p. 17a, *infra*) and that 'resort to collective bargaining' failed 'without fault of management' (p. 15a, *infra*). Each of these apparent findings of fact rested on matters not appearing on the face of the amended complaint and never put in issue, and seemed to propound facts adverse to the petitioners on the basis of no evidence or conflicting evidence in a record developed for a temporary injunction pending appeal." (Petition, pp. 10-11)

Obviously, the Court of Appeals based none of its findings or conclusions upon the fact that

> "The evidence in the record is to the effect that certain rules contained in existing agreements . . . during the

> year 1961, cost the railroad industry $592,062,000 in wage costs. . . ." (Opinion, p. 5; Petition, p. 6a)

although, as the District Court found (Tr. 510, 511; D.A. 192), the carriers' evidence on this subject was undisputed.

The petition misstates the conclusions of the Court of Appeals with respect to the effect of the agreement of October 17, 1960. In any event, no issue of fact is involved, and the court's interpretation of the agreement can scarcely be wrong in that the precise language contained in the agreement is used in the opinion.

It is also undisputed that the carriers accepted and that the organizations rejected the recommendations of the Presidential Railroad Commission. (Tr. 15, 16; D.A. 140, 143; see also page 8, *supra*) No one has ever contended otherwise. Furthermore, during the arguments before the Court of Appeals on October 22, 1962, counsel for the carriers stated (and now reaffirm) that

> ". . . the carriers have at all times been willing, and are now willing, to enter into an agreement with these organizations making effective the recommendations of the Presidential Railroad Commission."

And counsel for the organizations, in answer to a question from the Court, stated that the Commission's recommendations were unacceptable to the organizations. It may also be noted that the official report of the Commission, of which this Court will take judicial notice, shows that the carrier commissioners, although disappointed with many of the provisions of the report, recognized "the public interest being paramount" and accepted "the full report" (pp. 273, 274); and that the representatives of the organizations rejected the Commission's recommendations (pp. 189-271).

The use by the Court of Appeals of the terms "sterile discussion", "frustrated collective bargaining", and "resort

to collective bargaining" which failed "without fault of management" is improperly characterized by the organizations in their petition; nevertheless, no disputed facts are involved. If the Court concluded that the organizations did engage in sterile discussion, that the organizations frustrated collective bargaining, and that collective bargaining failed without fault of the management, its conclusions are entirely warranted on the basis of the undisputed facts which were made a part of the record in the District Court before the amended complaint was dismissed.

The opinion of the Court of Appeals neither recites nor relies upon any disputed fact, and all of the conclusions which appear in its opinion are based upon undisputed evidence which was in the record before the amended complaint was dismissed. Moreover, as the succeeding discussion will show, *the Court of Appeals affirmed the order of the District Court as a matter of law and upon the allegations of the amended complaint.*

## II. THE DECISION OF THE COURT OF APPEALS IS BASED ON SETTLED PRINCIPLES OF LAW AND DOES NOT INVOLVE CONSIDERATIONS WHICH WARRANT A REVIEW ON WRIT OF CERTIORARI

Although the organizations attempt to create the impression that this case involves important and novel questions of interpretation and application of the Railway Labor Act, the issues presented to and determined by the Court of Appeals were resolved by the application of settled principles of law. This is not apparent from the discussion which appears in the organizations' petition, but it is fully established when the issues presented to the Court of Appeals are accurately described and the basis of its disposition of the case is correctly stated.

**A. The Court of Appeals Affirmed the Order of the District Court as a Matter of Law and Upon the Allegations of the Amended Complaint.**

The Court of Appeals correctly summarized the significant allegations of the amended complaint, and the contentions of the organizations, on pages 8 and 9 of its opinion. (Petition, pp. 10a, 11a) The particular allegations of the amended complaint purporting to state the organizations' supposed cause of action are there quoted as follows:

> "'Said second Promulgation is in violation of Section 2, First of the Railway Labor Act in that it announces that effective August 16, 1962 there will be no rules concerning the assignment of employees • • • the minimum number of such assignments to a train or engine, and the classification of such assignments, • • • notwithstanding that for many years it has been the custom, practice, and usage for the collective bargaining agreements • • • to contain such rules • • •.'"

The organizations do not contend that the Court of Appeals misconstrued the amended complaint or that it did not correctly describe the contentions which the organizations have made in support of their claim that the promulgation is unlawful.

Having accurately and succinctly described the issues before it, the Court of Appeals then held that the carriers had complied with all of the procedural requirements of the Railway Labor Act,[10] and are now entitled, under the provisions of that Act, to make effective the proposals which they had served upon the organizations on November 2, 1959. In this connection the Court of Appeals correctly

[10] This fact has never been disputed or denied by the organizations. See pages 16-17 *supra*.

found that the organizations do not contest the right of the carriers to effectuate the rules in question, if the substantive content of the proposed rules is lawful. It stated:

> "While disclaiming any contention that a carrier may not, after complying with the procedural requirements of the Act and failing to reach agreement, change the rules governing the employment relation, the Organizations argue 'that unilaterally established rules must be rules and not a "rule" that there shall be no rules, and that such a "rule" that there shall be no rules can be established, if at all, only by agreement'." (Opinion, p. 13; Petition, p. 16a)

The Court of Appeals then ruled on this single issue raised by the amended complaint, as follows:

> "In view of this contention we have examined the contents of the promulgation under attack and we find that a set of rules is contained in three articles . . . we have examined it carefully and find that it is a statement of detailed rules affecting the work and pay of the operating employees of the railroads. It is not in any way subject to the criticism of being a rule that there shall be no rules." (Opinion, pp. 13, 14; Petition, p. 16a)

The Court of Appeals thus held (as did the District Court) that the proposed rules changes contained in the carriers' promulgation had been progressed through all of the procedures available to the carriers under the provisions of the Railway Labor Act relating to major disputes, that the exhaustion of those procedures made it lawful for the carriers to make such proposed rules changes effective, and that the proposed rules which would confer some discretion upon management in the use and assignment of employees are lawful and proper.

**B. The Decision of the Court of Appeals Follows Established Principles of Law and Well Settled Rules Laid Down by the Decisions of this Court.**

The organizations argue that

> "This case presents what is probably the most important issue that has yet arisen as to the interpretation and application of the Railway Labor Act. It presents the issue of the extent, if any, to which the Railway Labor Act leaves carriers with managerial prerogatives with respect to rates of pay, rules and working conditions." (Petition, p. 17)

This contention that the Railway Labor Act somehow governs the substantive content of agreements between carriers and their employees, and prohibits rules giving the carriers any discretion in matters relating to working conditions, overlooks the fact that the Railway Labor Act is entirely procedural in nature. See the discussion and description of the procedures in *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 325 U.S. 711 (1945), at page 725, where it is stated that self-help may be resorted to when the procedures are exhausted. The Act does not purport to prescribe or control the substantive results of the procedures required by the Act—or the substantive content of either agreements between a carrier and its employees or rules promulgated by a carrier pursuant to the provisions of the Act.

In *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), this Court said:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. *The national interest expressed by those Acts is not primarily in the working*

*conditions as such.* So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. *The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.* (p. 6)[11]

In *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), this Court further stated that

> "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. Cf. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." (p. 295)

The decision of this Court and the language quoted *supra* from its opinion in *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943), was cited and relied upon in *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395 (1952), involving the provisions of the National Labor Relations Act, in support of the finding that

> "The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." (p. 402)

> "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide a more flexible treatment of such matters is an issue for determination across the

[11] Emphasis ours in all quotations from the opinions of this Court.

bargaining table, not by the Board. *If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment* to be settled by bargaining." (pp. 408-9)

The position of the National Labor Relations Board, which was found to be untenable, was described as follows by this Court:

> "The Board considers that employer bargaining for a clause under which management retains initial responsibility for work scheduling, a 'condition of employment,' for the duration of the contract is an unfair labor practice because it is 'in derogation of' employees' statutory rights to bargain collectively as to conditions of employment." (pp. 407-408)

This Court rejected the Board's views, on the grounds that "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements." (pp. 408-09) Since this same principle is basic in this Court's interpretation of the Railway Labor Act,[12] it must follow that the rules proposed by the carriers, which would give management some discretion with respect to the consist of train and engine crews, are lawful and may be made effective after compliance with the procedural requirements of the Act.

The organizations also erroneously assert that:

> "Both the courts and the National Labor Relations Board have uniformly held that once a subject has been established as a collectively bargained item between an employer and his employees or in the in-

[12] Compare *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) where, at page 45 this Court relied on *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937), in support of its statement that the Act does not compel any agreement.

> dustry, the employer may not insist on his management prerogative." (Petition, p. 19)

But the decisions of the lower courts and of the National Labor Relations Board cited by the organizations do not support this contention. They only stand for the principle that "bargaining positions may . . . be given evidentiary consideration, along with all other relevant circumstances, in determining whether an employer by the totality of his conduct satisfied the good faith bargaining standards." (*"M" Systems, Inc.*, 129 NLRB 527, 550, 551) Furthermore, virtually all the decisions of the lower courts relied upon by the organizations preceded the decision of this Court in *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395, 408, 409 (1952), discussed *supra*.

The approach of the courts which have had occasion to deal with problems within the scope of this Court's decision in the *American National Insurance Company* case is illustrated by *White* v. *N.L.R.B.*, 255 F.2d 564 (C.A. 5, 1958). In that case the Board had concluded, on the basis of the employer's insistence upon a broad management discretion clause, that the employer had failed to bargain in good faith. The court stated the issue before it as follows:

> "We are at last required to determine whether, in an otherwise unassailable attitude of collective bargaining, the employer may nevertheless be found guilty of a failure to bargain in good faith *solely upon a consideration of the content of the proposals and counter proposals of the parties.* In other words, may the charge of refusal to bargain in good faith be sustained solely by reference to the terms and conditions of the employment contract which management finally says it is willing to sign if such proposed contract could fairly be found to be one which would leave the employes in no better state than they were without it." (pp. 565-6)

The court held that the employer did not commit an unfair labor practice when it insisted upon such provisions. To the same effect are *N.L.R.B.* v. *Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 7, 1960): ("It is not an unfair labor practice for an employer to bargain in good faith for an agreement assigning particular subjects of collective bargaining to management's exclusive control for the duration of the contract." p. 333); *Associated Unions* v. *N.L.R.B.*, 200 F.2d 52 (C.A. 7, 1952); *N.L.R.B.* v. *San Angelo Standard*, 228 F.2d 504 (C.A. 5, 1955); *N.L.R.B.* v. *Cummer-Graham Co.*, 279 F.2d 757 (C.A. 5, 1960). In *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960) this Court reaffirmed the principle announced in the *American National Insurance Company* case, that "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." (p. 488)

There is no dissent from the rule that a carrier, after complying with the procedural provisions of the Railway Labor Act, may revoke or modify any part or parts of the agreements between such carrier and its employees, and where such revocation or modification results in increasing the area or scope of management discretion, with respect to the working conditions of its employees, no violation of the Railway Labor Act results.

This position is supported by the cases cited and discussed above. It is also supported by the following cases and authorities.

1. *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 402, 403 (1942) held that it was no violation of the Railway Labor Act for a carrier to make unilateral changes in rates of pay, rules and working conditions in areas not covered or restricted by existing agreements, and thus recognized

that the existence of areas of management discretion was not unlawful. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 332, 334, 335 (1943) is to the same effect, in that it held that plaintiff's contentions that an agreement between the railroad and another organization was illegal because of its content and effect on plaintiffs did not give rise to a justiciable controversy. The case thus indicates that the Act does not in any way regulate the content of agreements.

2. The existence of areas of management discretion within the general framework of a collective agreement has also been recognized in many cases involving so-called minor disputes. These cases generally recognize that there is no violation of the Railway Labor Act where a carrier takes action in an area not restricted by collective agreements. *Norfolk & Portsmouth Belt Line Railroad Company* v. *Brotherhood of Railroad Trainmen*, 248 F.2d 34, 41, 44, 45 (C.A. 4, 1957), *cert. den.*, 335 U.S. 914; *Brotherhood of Railroad Trainmen* v. *New York Central*, 246 F.2d 114, 117, 118 (C.A. 6, 1957), *cert. den.*, 355 U.S. 877; *In Re Hudson & Manhattan Railroad Company*, 172 F. Supp. 329 (D.C., S.D. N.Y., 1959), affirmed 267 F.2d 941 (C.A. 2, 1959), *cert. den.*, 363 U.S. 843; *Hilbert* v. *Pennsylvania Railroad Company*, 290 F.2d 881, 883, 884 (C.A. 7, 1961), *cert. den.*, 368 U.S. 900; *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (C.A. 2, 1962); and *Robertson* v. *Atlantic Coast Line Railroad*, 18 Labor Cases, par. 65693 (D.C., D of C, 1950).

3. Other cases have held either that the Act does not regulate the content of agreements or that a carrier having exhausted the procedures of the Act may establish its own rules: *Brotherhood of Railway and Steamship Clerks* v.

*Atlantic Coast Line*, 201 F.2d 36, 41 (C.A. 4, 1953), *cert. den.*, 345 U.S. 992; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 132 F.2d 91, 94 (C.A. 5, 1942), reversed on other grounds, 320 U.S. 323.

4. The National Mediation Board has also recognized the existence of areas of management discretion as explained on pages 17 and 18 of its Twenty-Sixth Annual Report to the Congress (for the fiscal year ended June 30, 1960), and in reports for preceding years.

All the cases briefly referred to above are in harmony with the carriers' position that the Railway Labor Act does not restrict the content of agreements or the nature of the changes which may be made by a carrier which has exhausted the procedural requirements of the Act.

The same principle was also recognized by the organizations in the proceedings before the District Court in this dispute where it was admitted that "managerial prerogative clauses are quite common in other industries as under the Taft-Hartley law they are recognized." (P.A. 159) In making this admission the organizations perhaps overlooked the fact that this Court has never distinguished between the provisions of the Railway Labor Act and those of the National Labor Relations Act, insofar as they relate to "managerial prerogative clauses." As has heretofore been pointed out, this Court has cited, quoted and relied upon its rulings as to the scope and effect of the Railway Labor Act in reaching its conclusions as to the scope and effect of the National Labor Relations Act. *National Labor Relations Board* v. *American National Insurance Company*, 343 U.S. 395, 402 (1952).

## III. THE CARRIERS' PROPOSED RULES WOULD NOT "ABOLISH CRAFT OR CLASS DISTINCTIONS" IN VIOLATION OF ANY OF THE PROVISIONS OF THE RAILWAY LABOR ACT

As heretofore shown (p. 2, *supra*), question numbered 4, stated on page 3 of the petition (now supplemented for the first time by question numbered 3), is not properly involved in these proceedings. This issue was not pleaded, argued, mentioned or referred to by the organizations in the District Court, and the Court of Appeals properly held "This contention comes too late now." (Opinion p. 14, Petition p. 17a)[13] Nevertheless, consideration will be given to the organizations' contentions involving this subject matter, because they were considered by the Court of Appeals and because such contentions are reiterated (and supplemented) in the petition filed with this Court.

1. The organizations' question numbered 3 asks whether a carrier is required to deal with them and follow the procedures of the Railway Labor Act concerning changes in rules relating to job content and crew consist. The organizations' statement of the question and argument is based upon an obvious misconstruction of the position of the carriers and the opinion of the Court of Appeals. No question of bargainability is involved in this case. The carriers

[13] See *McComb* v. *Goldblatt Bros.*, 166 F.2d 387, 389, 390 (C.A. 7, 1948); *Chatos* v. *Midco Oil Corp.*, 152 F.2d 153, 154 (C.A. 7, 1945), cert. den. 329 U.S. 717; *Commercial National Bank* v. *Reber*, 74 F.2d 301, 302 (C.A. 3, 1934); *Atlantic Brewing Company* v. *Brennan Grocery Company*, 79 F.2d 45, 48 (C.A. 8, 1935).

The contention on page 25 of the petition that "the wiping out of crafts or classes was one result of the absence of rules and hence was raised by the amended complaint" is obviously a poorly considered afterthought—although it must be admitted that the point is so lacking in substance that it is not surprising that it did not occur to the many counsel representing the organizations until 37 days after their amended complaint was filed.

have never contended, and the Court of Appeals did not hold, that the carriers are not required by the Act to bargain with their employees with respect to proposed changes in rules involving the assignment of work or the consist of crews. The record shows, and the Court of Appeals did hold, that the carriers have bargained with their employees with respect to such proposed rules changes "for more than 20 years . . . in the light of the great technological improvements in the industry, but such efforts have produced no substantial or meaningful relief." (Opinion, p. 3; Petition, p. 4a).

The record also shows that on November 2, 1959, the carriers proposed rules changes which would give managements the right to exercise some discretion with respect to the assignment of work and the consist of crews. The record further shows, and the Court of Appeals held, that these proposed rules changes were the subject of collective bargaining between the carriers and their employees, were progressed through all the procedures available to the carriers under the Railway Labor Act in their efforts to reach an agreement with the organizations, and that having failed to reach an agreement, the carriers are entitled, under the Railway Labor Act, to make these proposed rules or rules changes effective.

The statement on page 22 of the petition that "the court below was clearly wrong when it adopted as its own the carriers' statement that assignment of work is a subject with which the Railway Labor Act does not deal" will be further considered in the following discussion of petitioners' question numbered 4.

2. The contention that the carriers' proposed rule, which would permit the use of certain train and engine crews to perform (subject to specified conditions) both so-called road

and yard work (P.A. 67), would "abolish crafts and classes" contrary to the provisions of the Railway Labor Act, is based upon a distortion of the meaning of the term "class or craft" as used in the Act.

In the Court of Appeals, the organizations argued that the Act establishes immutable crafts or classes, and thereby prohibits the transfer of work from one to another where such transfers might alter the existing structure.[14] The Court of Appeals in that context held that the Railway Labor Act does not deal with the subject of "assignment of work." The organizations have seized upon this language as a holding by the Court of Appeals that the subject of assignment of work is not one for collective bargaining. The opinion of the Court of Appeals is not subject to this interpretation. It does not deal with bargainability but only responds to the claim that the provisions of the Act, independently of agreement, regulate the manner in which the carriers may assign work.

The organizations further argue that the provisions of the Railway Labor Act establish a substantive right inur-

[14] To the contrary see *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943), and *Flight Engineers International Association* v. *National Mediation Board*, 294 F.2d 905 (C.A., D.C., 1961), cert. den., 368 U.S. 956, in which the court said, at page 908,

> "Under the Railway Labor Act, only the National Mediation Board (or the committee designated by it) has the power to make craft or class determinations. *Switchmen's Union of North America* v. *N.M.B.*, 1943, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. The right given to employees is that of designating, by a majority of those comprising a 'craft or class', their representatives. See 320 U.S. at Pages 300-301, 64 S.Ct. at Pages 96-97. *It has become well settled that in making 'craft or class' determinations, the National Mediation Board may regroup, amalgamate, or splinter historic bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a 'class' for representation in a jurisdictional dispute is unreviewable by the Courts.*"

ing to those "crafts or classes" now in existence to continue as such, and that any assignment of work by a carrier which might conceivably result in a change or realignment of the existing class or craft structure, is illegal. The only authority offered in support of this contention is the allegation that the Act should be so construed. But that the provisions of the Act do not in fact support the organizations' contention is apparent from the following brief discussion of the sections of the Act cited in the petition:

Section 1, Fifth (45 U.S.C., Sec. 151, Fifth) defines the term "employee" by reference to the orders of the Interstate Commerce Commission under the authority therein delegated to it. Under Section 2, Fourth, of the Act, "employees" are given the right to organize and bargain collectively. If such a grant is to have meaning, employees must first be defined and distinguished from officers. Section 1, Fifth, provides methods for accomplishing these purposes, but also states:

> "That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railroad employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act."

In *Brotherhood of Locomotive Firemen and Enginemen* v. *Interstate Commerce Commission*, 147 F.2d 312 (C.A. D.C., 1945), the court stated that the purpose of Section 1, Fifth is to define and separate employees and subordinate officials from officers. No support for the organizations' position can, therefore, be derived from this Section.

Section 2, Fourth (45 U.S.C., Sec. 152, Fourth) is designed to permit organization and bargaining by the rep-

resentatives of a majority of a "craft or class" and to prohibit the carriers from interfering with the employees' right to organize. To read into this section a substantive definition of what crafts or classes shall be, impinging upon assignment of work by the carriers, defies the plain language used.

Section 3 (45 U.S.C., Sec. 153) establishes the National Railroad Adjustment Board and procedure to be followed by that Board in handling disputes of the so-called minor type. Petitioners refer to the fact that the First Division of the Board is constituted, insofar as labor membership is concerned, of members appointed from the ranks of each of the five major operating labor organizations. They apparently infer that this is a recognition of the immutability of established "crafts or classes." Plainly, this division of the Board is so constituted, as a matter of practicality, to insure adequate representation and does not have any effect on the right of the carriers to assign work.

Certainly "classes or crafts" of employees are to be determined for representation purposes, as illustrated by cited preceding sections of the Act. Such a determination, however, is always subject to change, if for no other reason than by jurisdictional disputes between the employees themselves. However, the fact that "crafts and classes" of employees are determined for this purpose and that the National Railroad Adjustment Board is constituted of members of each of the five operating crafts now in existence cannot be used to support any inference that the Act, in and of itself, limits management as to what work it may assign any employee.

This brief examination of the Railway Labor Act sections relied upon indicates unequivocally that the term

"craft or class" is used in a limited sense. In effect, the Act authorizes the majority of a "craft or class" to select its representatives for the purposes of organization and bargaining. It does not define the term, and authorizes the Mediation Board to determine what is an appropriate "class or craft" when one organization seeks representation rights held by another. The carriers' second promulgation does not touch upon this subject, and does not interfere with organization and bargaining as contemplated in the Act. The promulgation simply gives the carriers the right (since collective bargaining procedures have been exhausted) to determine, for example, the number of trainmen that shall be used in road train crews and of that number, how many are to be conductors, ticket collectors, baggagemen, and brakemen. It likewise gives the carriers the right to use road crews in yard service and yard crews in road service, subject to the limitations provided in the proposed rule.

Clearly, the organizations' real complaint goes to the carriers' assignment of work. As the Court of Appeals properly held, the Railway Labor Act does not deal with that subject.

In their petition for rehearing filed with the Court of Appeals, and in the instant petition before this Court, the organizations seem primarily concerned with the assumption that one organization, namely, the Switchmen's Union of North America, may, in some way, be adversely affected by carriers' proposed rules changes.[15] Even if such an

[15] Both engineers and firemen, whether they work in road or yard service, are represented by the same organizations and have both road and yard seniority rights. Whether they work in road or in yard service depends upon the extent of their seniority and their choice of available assignments. Most road and yard trainmen are represented by the Brotherhood of Railroad Trainmen and many are similarly situated. Obviously, a combination of road and yard service would destroy no craft or class. The relatively few yard

assumption is warranted, which it is not, and even if such an assumption had been raised in the District Court, which it was not, the result would not be a wiping out of the concept of craft or class, but at the most, a realignment of the consist of existing "crafts or classes," a possibility which is contemplated by the Act.

Furthermore, it is not the purpose of the Railway Labor Act to preserve, or foster, or protect any labor organization by guaranteeing to it representation rights of any "class or craft."

## CONCLUSION

For the reasons stated and on the authority cited herein, the carriers respectfully request this Honorable Court to deny the petition of the organizations for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

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trainmen represented by the Switchmen's Union of North America are a "class or craft" only in the sense that they are a splinter group of railroad operating employees represented on a few railroads by that union.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners,*

v.

THE BALTIMORE & OHIO RAILROAD, *et al., Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 730

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*,

v.

THE BALTIMORE & OHIO RAILROAD, *et al.*, *Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In this reply brief we shall not answer all the numerous statements in the brief in opposition which are erroneous nor the arguments which petitioners consider unsound, but shall confine ourselves to pointing out the misstatements concerning the factual bases for the decision of the Court of Appeals.

1. The repeated statements in the brief in opposition (pp. 12, 14, 17-19) that the District Court had before it prior to its dismissal of the amended complaint "The facts referred to by the Court of Appeals" (p. 12) or "substantially all" the evidence summarized (p. 18) or "all the material facts" (p. 19), are based on the assumption that these facts were stated to the District Court by counsel for the carriers under circumstances which placed on the labor organizations the burden of introducing evidence or standing bound by all carrier counsel's statements (Br., pp. 14, 17, 18).

The statement of facts by counsel for the carriers was made in support of his first motion to dismiss the original complaint on the ground that the labor organizations had not exhausted their administrative remedies because they had not called a strike which could lead to the appointment of an Emergency Board (P.A. 120; Tr. 7-8, 9, 24-35). This statement of facts was made prior to the issuance of the second promulgation. So when counsel for the carriers stated his willingness to offer witnesses if there was any dispute over any "material" fact or "any matter that is material to this motion" (P.A. 137; Tr. 9-10), the only issue by which to judge materiality was that of exhaustion of remedies, since this was the only issue then before the District Court. There was no conceivable basis on which counsel for the labor organizations had any burden to challenge statements by opposing counsel not material to the exhaustion issue.

Nor is it true as the carriers assert (Br., p. 17) that counsel for the organizations did not question any part of the carriers' statement of facts as not true. Counsel for the labor organizations did take issue with such of the statements of counsel for the carriers as could con-

ceivably have any relevance to the issue of exhaustion of remedies. For instance, counsel for the labor organizations challenged (Tr. 43-44) the carriers' statement that the United States Government was committed to the appointment of an Emergency Board if a strike should be called (Tr. 31-35). Counsel for the labor organizations stated that at the conference to which the carriers referred the representatives of the Government refused to discuss the possibility of an Emergency Board on the ground that the subject was premature (Tr. 43-44). Counsel for the labor organizations also challenged (Tr. 67) the statement of counsel for the carriers (Tr. 21, 59) that the promulgation of July 17, 1962 conformed to the recommendations of the Presidential Railroad Commission.

The District Court overruled the first motion to dismiss the original complaint holding that the suit was not prematurely brought and that the labor organizations had exhusted their administrative remedies (P.A. 127-128). In view of the fact that the District Court agreed with the legal position of the labor organizations on the first motion to dismiss the original complaint, there was even less reason for the labor organizations to call attention to the untruth of each of the misstatements of fact made by counsel for the carriers in the course of his argument in support of the first motion.

2. That counsel for the carriers restated some of the same supposed facts during his argument in opposition to the oral motion of counsel for the labor organizations for leave to file an amended complaint, does not constitute putting these facts before the court on the

motion to dismiss the amended complaint, as the carriers argue (Br., pp. 14, 18). The statement in the carriers' brief in opposition (p. 18) that the District Court, following this recital of supposed facts, "then twice" asked counsel for the labor organizations if they had anything further "to submit" and each time received a negative answer, is completely misleading. In neither instance was the District Court offering counsel for the labor organizations an opportunity to submit evidence on the issue of the sufficiency of the amended complaint.

The first instance to which the carriers refer (Br., p. 18) occurred at the close of the arguments on the motion of the labor organizations for leave to amend the original complaint to attack the validity of the second promulgation. The Court then asked counsel for the labor organizations (P.A. 161; Tr. 136):

> "Mr. Schoene, is there anything else that you have other than the amendment that you have proposed?"

This hardly constituted an offer to receive evidence with respect to an amended complaint when the District Court had not yet allowed the complaint to be amended.

The second instance to which the carriers refer (Br., p. 18) occurred immediately after the District Court had denied leave to amend the complaint (P.A. 161; Tr. 137). The District Court then informed counsel that he would go back to the second motion to dismiss the original complaint, namely, the motion to dismiss as moot due to withdrawal of the first promulgation, and asked if there was "any further response on

that" (P.A. 161-162, Tr. 137). Counsel for the labor organizations replied (P.A. 162; Tr. 137):

> "I think not, if the Court has denied the motion for leave to file the amended complaint."

This can by no stretch of the imagination constitute an offer to receive evidence on an amended complaint which counsel had been denied leave to file.

3. The most crucial facts relied upon by the Court of Appeals in its opinion were never even stated to the District Court by anybody or in any manner prior to the granting of the motion to dismiss the amended complaint. Thus the carriers' brief in opposition (pp. 12, 14, 17-21) is not only in error in claiming that such facts as were stated by counsel for the carriers in his arguments were before the District Court as undisputed evidence but the crucial facts were not even before the District Court as statements of counsel. At no time prior to the granting of the motion to dismiss did counsel for the carriers or anyone else so much as imply that the labor organizations engaged in "sterile discussion" (Pet., p. 15a) or that "resort to collective bargaining" failed "without fault of management" (Pet., p. 15a). The Court of Appeals seems to regard these "facts" as decisive for it speaks of "sterile discussion" as the controlling factor in "placing the carriers in a position to exercise their prerogatives to unilaterally put into effect their proposed changes" (Pet., p. 15a).

4. The repeated statements in the brief in opposition that the facts stated by the Court of Appeals were undisputed (Br., pp. 12, 14, 17-21) are obviously false.

The labor organizations have never, at any time, conceded that they engaged in sterile discussion or frustrated collective bargaining or that bargaining failed through no fault of management. Nor have they ever conceded that they insisted on unreasonable rules or that the rules in question cost the carriers $592,062,000 during 1961 (Pet., p. 6a). No such assertion was ever made prior to the granting of the motion to dismiss, so the labor organizations had no opportunity to put such assertions in issue. Not until the opinion of the Court of Appeals was handed down were the labor organizations ever put on notice that such disputed contentions of fact were deemed relevant to the question of whether the amended complaint states a claim upon which relief may be granted. They at once filed a petition for rehearing disputing the basis for any such findings of fact (Pet. for Reh., pp. 5-7).

5. The statement of the case set forth in the brief in opposition (pp. 3-11) constitutes merely the carriers' version of the facts, a version not supported by the amended complaint, and hence is not properly before this Court. Almost the entire Statement of the Case in the carriers' brief in opposition consists of supposed facts not asserted even by carrier counsel until after the amended complaint had been dismissed for failure to state a cause of action.

6. The carriers' assertion that it has never been disputed or denied by the labor organizations that the carriers have complied with all the procedural requirements of the Railway Labor Act (Br., p. 22, n. 10) is not true. The main point of the amended complaint is that the procedural provisions of the Railway Labor Act, as well as its substantive provisions, require notice

and processing of the specific standards as to rules and working conditions proposed by a carrier, which is the requirement the carriers seek to avoid. In addition, while we do not believe the evidence introduced during the hearing on the motion for injunction pending appeal should properly be considered as bearing on the question whether the amended complaint states a cause of action, if it is considered, there was conflicting testimony as to what negotiations, if any, had ever taken place on the November 2, 1960 notices (No. 13855, P.A. 6, 34).

7. The carriers' assertion (Br., pp. 36-37, n. 15) that "the relatively few yard trainmen represented by the Switchmen's Union of North America are a 'class or craft' only in the sense that they are a splinter group of railroad operating employees represented on a few railroads by that union" is untrue. On every railroad in the country the National Mediation Board treats yard foremen, helpers, and switchtenders as a separate craft or class. See 6th column of Table 10 at pp. 88-90 of the Twenty Seventh Annual Report of the National Mediation Board (G.P.O., 1961). As is apparent from the cited table, the Switchmen's Union of North America represents this craft or class on many important railroads. For decisions of the National Mediation Board holding that this is a distinct craft or class see *Spokane, Portland & Seattle Ry.*, 3 N.M.B. Determinations 159, 164 (1954); *Akron, Canton & Youngstown Ry. Co.*, 1 N.M.B. Determinations 126, 129 (1938); *New York Central Railroad Co.*, 1 N.M.B. Determinations 197, 209 (1941).